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Supreme Court of the United States

CHARLES L. DOUGLAS,
Petitioner,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

BRIEF OF RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ON REARGUMENT.

Opinions of the Courts Below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this State. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term, but wrote no opinion. 223 App. Div. 782 (R., 18).

The Court of Appeals, on May 29th, 1928, in 248 N. Y. 580, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

Jurisdiction of This Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this Court on July 26th, 1928.

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co., supra,* which held that the courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

Statement of the Case

The plaintiff-petitioner brought this action to recover for injuries received on December 1st, 1927, while in the

defendant-respondent's employ in its railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of the suit (R., 10). He was and is a citizen of the United States, and a citizen and resident of the State of Connecticut (R., 17).

The summons and complaint were served upon the defendant-respondent in the City of New York, on December 22nd, 1927 (R., 2). The service was made on Frank E. Hall, assistant-treasurer, and the person designated upon whom service of process may be made (R., 6, 7, 9).

The respondent is organized under and by virtue of the laws of the State of Connecticut, is authorized to do business in the State of New York, and was and is engaged in interstate commerce. It is a railroad corporation. It applied for and received a certificate to do business in New York from the Secretary of State as provided by the General Corporation Law of New York (R., 7).

In its motion to dismiss the complaint the respondent urged that it would be unnecessarily burdensome to try this case in New York and that petitioner would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The respondent moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-resi-

dents, the jurisdiction of the court was wholly discretionary; that the court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that § 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the Federal Constitution in so far as it permits the court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

ARGUMENT

POINT I

The Order and Judgment do not violate § 2 of Article IV of the Constitution of the United States.

(a) The New York statutory situation.

In 2 Revised Statutes, Part 3, Chapter 8, Title 4, Article I, Section 15, we find the following provision:

> "Suits brought in the Supreme Court by residents of this state against any corporation created by or under the laws of any other state, government or country, for the recovery of any debt or damages, may be commenced by attachment."

This was the first legislation authorizing a proceeding in rem against a foreign corporation, and then such proceeding could only be instituted by a resident of the State.

Chapter 107 of the Laws of 1849 read as follows:

> "§ 1. Section fifteen, article one, title four, chapter eight, part third, of the Revised Statutes, is hereby amended so as to read as follows:

"§ 15. Suits may be brought (in the supreme court, in the superior court of the city of New York, and in the court of common pleas in and for the city and county of New York) against any corporation, created by or under the laws of any other state government or country, for the recovery of any debt or damages, whether liquidated or not, arising upon contract made, executed or delivered, within this state, or upon any cause of action arising therein, such suits may be commenced by complaint and summons together with an attachment, as now provided by law, and such complaint and summons may be served as provided by sections one hundred and thirteen, and one hundred and fourteen of the code of procedure."

Chapter 438 of the Laws of 1849 contained the following provision:

"§ 427. An action against a corporation, created by or under the laws of any other state, government, or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases:

"1. By a resident of this state, for any cause of action;

"2. By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state."

Code of Civil Procedure, Section 1780 (1876), read as follows:

"An action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. An action

against a foreign corporation may be maintained by another foreign corporation or by a non-resident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

"3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

By an amendment (Chap. 60, Laws of 1913) a fourth provision was added:

"4. Where a foreign corporation is doing business within this state."

Chapter 916 of the Laws of 1920, entitled "An Act to amend the general corporation law, in relation to actions by and against foreign corporations," effective May 21, 1920, reads in part as follows:

"§ 46. Action against foreign corporation. An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action.

"§ 47. *Action against foreign corporation by* another foreign corporation or *non-resident. An action against a foreign corporation may be maintained* by another foreign corporation, or *by a non-resident, in one of the following cases only:*

"1. Where the action is brought to recover dam-

ages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

"3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

"4. *Where a foreign corporation is doing business within this state.*

"Within the meaning of this section, a foreign corporation shall not include a corporation located in this state and created by or under the laws of the United States" (Italics ours).

The above became §§ 46 and 47 of the General Corporation Law, and represents the present statutory situation.

Until 1849 there was no statutory provision for suit by a non-resident against a foreign corporation, and by statute a resident could sue a foreign corporation only by way of attachment. In 1849 a suit could be brought by a non-resident against a foreign corporation when the cause of action arose or the subject of the action was situated within the State, but a resident could sue on any cause of action. The statutes passed in 1849 did not define all cases so the courts still had their general jurisdiction by which any plaintiff could sue a foreign corporation for any cause of action provided jurisdiction could be obtained of the corporation. When Section 1780 of the Code of Civil Procedure was enacted, in 1876, as a result of *McCormick* v. *Pennsyl-*

vania R. R. Co., 49 N. Y. 303 (1872), an action by a non-resident against a foreign corporation could be maintained only in the cases specified. "The jurisdiction of the courts is defined and limited and absolutely confined to the cases specified, * * *." *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315, 323 (1889). This policy was expressly recognized in *Barrow Steamship Company* v. *Kane*, 170 U. S. 100, 110, 112, 113, and the statute was also discussed in *Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373. Between 1876 and 1913 the New York courts did not have jurisdiction of actions where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action was based upon a tort committed in another State. From 1913 to date the jurisdiction has been discretionary. Thus foreign corporations are now treated as non-resident individuals have long been treated.

Petitioner's Brief (pp. 10-13) refers to some seven cases where the Supreme Court of the State of New York entertained actions in tort brought by residents of New York against foreign corporations. The opinions in those cases do not discuss the question with which we are here concerned, and the defendants did not raise any jurisdictional point. *Flynn* v. *Central Railroad Company of New Jersey*, 142 N. Y. 439 (Petitioner's Brief, pp. 13-15), is in line with our statement above, that under the common law any plaintiff could sue a foreign corporation for any cause of action provided jurisdiction could be obtained of the corporation. We find Petitioner agrees to this (bottom of p. 17, top of p. 18).

(b) What is the right of a resident of New York?

Under § 46 of the General Corporation Law of New

York an action *may* be maintained against a foreign corporation for any cause of action. It is true that in *Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, 159, the opinion contains a dictum that a selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the United States Constitution. "Yet in denying the existence of a power to decline jurisdiction in the case of residents the court acted, it is submitted, without any convincing justification." We agree with the above statement by Mr. Paxton Blair in an article entitled "The Doctrine of Forum Non Conveniens," Columbia Law Review, Volume XXIX, No. 1, p. 13 (Jan., 1929).

In *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434, the plaintiff, a resident of New York, received letters of administration and brought suit against a New Jersey corporation on account of an accident in New Jersey resulting in fatal injuries to plaintiff's deceased. The Appellate Division exercised its discretion in refusing to entertain jurisdiction of the plaintiff's action, and the Court of Appeals said that the Appellate Division undoubtedly possessed this discretionary power. The Court of Appeals said:

> "It could well hold that the court was not bound to exercise jurisdiction, although the plaintiff was a resident, where, as Mr. Justice Ingraham says, in his opinion, 'those solely benefited are non-residents and where no reason exists why the liability cannot be enforced in the state where the parties reside and where the accident happened * * * but resort must be had to the laws of that state (New Jersey) to determine whether or not a cause of action exists.' (131 App. Div. 833.)" (P. 439.)

In *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, Mr. Justice Holmes said at page 151:

> "I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts."

If the Constitution says in effect that the New York resident must be treated exactly as the Connecticut resident, as to the right to bring suit in New York courts, and if the general grant, without qualification, is unconstitutionally limited to a resident plaintiff, it cannot be presumed to give to a non-resident the full unqualified grant.

Both § 46 and § 47 of the General Corporation Law of New York contain the word "may," but the opinion in *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* says that the courts have never refused to entertain jurisdiction over a foreign corporation in behalf of a resident for a transitory cause of action such as contract and tort cases arising outside of the State. This is somewhat negatived by *Pietraroia* v. *New Jersey & Hudson River Ry. & F. Co., supra,* at p. 439, but is in line with *Palmer* v. *Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63, 67 (1881); *Grant* v. *Cananea Con. Copper Co.*, 189 N. Y. 241, 247, 248 (1907) and *McCauley* v. *Georgia Railroad Bank*, 239 N. Y. 514 (1924).

While there is no statutory or constitutional reason, we submit, why this should be so, this is the situation as it obtains in New York State at the present time. The opinion in *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* admits rejection of litigation even by residents where it is futile and useless to assume jurisdiction (p. 160). There is some indication that if plaintiff had been a citizen jurisdic-

tion would be compulsory, but this is dictum, and throughout emphasis is laid upon residence (p. 159). A further limitation of the broad ruling of *Gregonis* v. *Phila. & Reading Coal & Iron Co., supra,* is made in *Swift & Co.* v. *Obcanska Zalozna V. Karline,* 245 N. Y. 570 (1927), holding the Court did not have jurisdiction of an action brought by a foreign corporation which had obtained permission to do business in New York and was doing business there, the action being to recover for money had and received against a foreign corporation not doing business in the State, the cause of action not arising in the State and not concerning property there.

(c) What is the right of a citizen of New York?

In this connection we quote below at some length the opinion in *Adams* v. *Penn Bank of Pittsburgh,* 35 Hun 393, General Term of the Supreme Court of New York (1885):

> "Section 1780 of the Code of Civil Procedure, which is controlling of the cases in which actions may be maintained in the courts of this State against foreign corporations, does not permit such an action by a non-resident, except in certain specified cases, neither of which exists in this action. The plaintiff being a resident may be presumed to be a citizen of the State of Pennsylvania, although that fact is not affirmatively shown. But, assuming him to be such, he is entitled to all the privileges and immunities secured to citizens of the United States, and of the several States, by the Constitution of the United States. But those provisions do not secure to citizens of any State the right to exercise in another State, privileges and immunities which are not conferred upon citizens of that State. For instance, the plaintiff does not by virtue of any provision of the

Constitution of the United States possess the right to maintain an action against the defendant in this State, because he might maintain such an action in the State of Pennsylvania. The privileges and immunities that he can claim in this State under the Constitution are only such as pertain to citizens of this State by reason of their citizenship. In order, therefore, to entitle him to maintain his action against a foreign corporation, notwithstanding the provisions of the Code to the contrary, he must be able to show that a citizen of this State circumstanced precisely as he is, could maintain such an action. *But it is manifest that under section 1780 the right to maintain the action does not depend upon citizenship, but upon residence; and a citizen of this State who actually resides in the State of Pennsylvania cannot by reason of his citizenship sue a corporation of Pennsylvania in our courts, except in one of the cases specifically declared by statute.* As the question is wholly controlled by residence, it necessarily follows that a resident of another State cannot come into our courts and insist upon maintaining an action against a foreign corporation, except only in cases allowed by our statute. The plaintiff, therefore, fails to show any right to maintain his action against the defendant, and consequently is not entitled to hold the attachment which he has sued out" (pp. 394, 395). (Italics ours.)

We find the case of *Adams* v. *Penn Bank of Pittsburgh, supra*, decided in 1885, cited in *Robinson* v. *Oceanic Steam Nav. Co., supra*, at page 324, decided in 1889, and set out again in *Klotz* v. *Angle*, 220 N. Y. 347, at page 358, decided in 1917. The case of *Robinson* v. *Oceanic Steam Nav. Co., supra*, is quoted in *Canadian Northern Ry.* v. *Eggen*, 252 U. S. 553, and referred to in *Barrow Steamship Co.* v. *Kane, supra*. *Adams* v. *Penn Bank of Pittsburgh* is one of the

very few cases which we have found in New York expressly dealing with the alleged right of a citizen of New York to bring suit in that State, and we think it completely answers one of the questions asked during the oral argument.

In *Duquesne Club* v. *Penn Bank of Pittsburgh*, 35 Hun 390, Davis, *P.J.*, said at page 393:

> "But if it were otherwise, and the plaintiff corporation is to be regarded as a citizen of Pennsylvania, it would not have the right to maintain this action in our courts, because the right to maintain such actions against foreign corporations is not one under our law that pertains to citizenship, but is a right pertaining only to residence. *A citizen of our State who is not a resident of the State, could not maintain the action under section 1780 of the Code, and therefore a citizen of another State, who is not a resident of this State, is equally denied the right to maintain such an action.* There is nothing, therefore, we think, at all in conflict with any of the provisions of the Constitution of the United States in our statutory enactments controlling this class of cases. As the action cannot be maintained it necessarily follows, therefore, that the right of attachment cannot be upheld" (Italics ours).

In line with these two opinions is *Frost* v. *Brisbin*, 19 Wend. 11 (1837).

(d) The so-called discrimination is not between citizens and non-citizens, but between residents and non-residents.

Robinson v. *Oceanic Steam Nav. Co., supra*, referring to Section 1780 of the Code, said:

> "This section makes no discrimination between citizens, but between residents and non-residents" (p. 324).

In *Johnson* v. *Victoria Chief Copper Mining & S. Co.*, 150 App. Div. 653 (1912), plaintiff was a resident of Kentucky; defendant was located in the Territory of New Mexico. This was an action for an accounting in relation to a partnership for the development of mines in a foreign territory. The opinion reads in part:

> "Under these conditions the provisions of section 1780 of the Code of Civil Procedure are applicable, for the cause of action in question does not come within any one of the classes of cases in which a non-resident may maintain an action against a foreign corporation in the courts of this State. In *Robinson* v. *Oceanic Steam Navigation Company* (112 N. Y. 315) this section was held not to violate the provisions of the Constitution of the United States, for the reason that it made no discrimination between citizens of various States, but only between residents and non-residents" (p. 654).

It has been the unanimous opinion of the Court of Appeals that § 1780 of the Code did not conflict with any provision of the Federal Constitution or with the Federal authorities upon the subject. *Grant* v. *Cananea Con. Copper Co., supra.* See also *Fairclough* v. *Southern Pac. Co., et al.*, 171 App. Div. 496, affirmed in 219 N. Y. 657 on authority of *Robinson* v. *Oceanic Steam Navigation Co., supra,* and *Klotz* v. *Angle, supra.*

Steigleder v. *McQuesten*, 198 U. S. 141, points out that it has long been settled that residence and citizenship are wholly different things within the meaning of the Con-

stitution. A person can be a citizen of New York and a resident of Connecticut, and a person can be a citizen of Connecticut and a resident of New York. "But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution * * *" (p. 143).

In *LaTourette* v. *McMaster*, 248 U. S. 465, this court adopted the state court interpretation of a state statute, distinguishing between citizen and resident. It was argued that the right to pursue a lawful business was the privilege of a citizen (p. 469). LaTourette could not comply with the residence section of the South Carolina law as he was a resident and citizen of New York, and the case holds that discrimination against non-residents is not necessarily unconstitutional and may often be justified as reasonable.

In *Maxwell* v. *Bugbee*, 250 U. S. 525, this court recognized in a tax case that the difference in the method of taxation rested upon residence and not upon citizenship, and consequently there was no unconstitutional discrimination. In *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, New York discriminated against all non-residents with no reasonable ground for diversity of treatment, but this court again pointed out that the terms "resident" and "citizen" were not synonymous.

In *Canadian N. Ry. Co. v. Eggen, supra*, a resident of South Dakota, injured in Canada, sued in Minnesota, and the court applied the one year statute of Canada. If plaintiff had been a citizen of Minnesota a different statute of limitations would have applied. It will be recalled that it was in this case that this court cited with approval

Robinson v. *Oceanic Steam Nav. Co., supra. Chemung Canal Bank* v. *Lowery,* 93 U. S. 72, also involved a statute of limitations. In *Canadian Northern Ry. Co.* v. *Eggen, supra,* petitioner argued that the power to classify exists; that the difference in right or privilege resulting from classification is not objectionable provided the classification has a reasonable basis; that the differences upon which the classification is based need not be great or conspicuous; either logically appropriate or scientifically accurate. In that case the statute contained the word citizenship whereas in the case here we have involved the word residence, and seek to give it a natural meaning different from citizenship. It "must be taken in the sense which best harmonizes with the subject matter in reference to which it is used." *Union Hotel Company* v. *Hersee,* 79 N. Y. 454, 461.

Please see also *Cummings* v. *Wingo,* 31 S. C. 427; *Central R. R. Co.* v. *Georgia, etc., Co.,* 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.,* 107 Ohio St. 352, dismissed by stipulation in 266 U. S. 639, discussed at length under Point II. The Ohio statute went farther than the one here involved, allowing no consideration of reasonableness.

The Fourteenth Amendment does not make a resident in a State a citizen of such State unless he intends by residence therein to become a citizen. *Sharon* v. *Hill,* 26 Fed. 337, 344. "No length of residence, without the intention of remaining, constitutes domicile." *Penfield* v. *Chesapeake & cc. R'd Co.,* 134 U. S. 351, 356.

Such legislation as we find in New York, covering a long period of time, more drastic in its early stages than now, should not be overruled unless necessarily incompatible with the supreme law of the land. *Field* v. *Clark,* 143 U. S.

649, 691. Mr. Justice Clark, writing the opinion of this Court in *Canadian Northern Ry. Co.* v. *Eggen, supra,* quoted from *Robinson* v. *Oceanic Steam Nav. Co., supra,* as follows:

> "A construction of the constitutional limitation (the one we are considering) which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters" (p. 553).

Objection has been made to the claimed distinction by reason of Amendment 14, § 1, of the Constitution, but the protection afforded relates to "privileges and immunities of citizens of the United States • • •."

To adopt the distinction made by New York of its own statute all doubt of its constitutionality vanishes and we follow the general rule to uphold an act if possible.

We do not lose sight of the significance of *Blake* v. *McClung,* 172 U. S. 239, which held that Tennessee could not by statute give her citizens preference over the citizens of other States in the assets of a foreign corporation though the statute granting the preference used the word "resident" rather than the word "citizen." This court threw overboard the state distinction in view of the purpose and scope of the statute, saying that the words "residents of any other country or countries" were used in the sense of domicile and hence citizenship. But the manifest purpose and scope were different from those in the case at bar where residence does not appertain to or inhere in citizenship. The opinion recognizes the fact that one may be a citizen

of one State and a resident of another. This case is quoted in *Canadian Northern Ry. Co.* v. *Eggen, supra,* to the effect that certain regulations of the internal affairs of the State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States (pp. 561, 562).

(e) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment.

(1) *The constitutional question does not arise in this case because of the circumstances.*

There are several dicta by this court to the effect that there is a constitutional right to sue but we urge that this constitutional right or privilege does not arise in this case by reason of the circumstances. Certain conclusions can be drawn from *Chambers* v. *Baltimore & Ohio R. R. Co., supra.* This court affirmed the judgment of the State Supreme Court which set aside a verdict and judgment for the plaintiff and dismissed the complaint. No unconstitutional discrimination was shown because the statute made the citizenship of the deceased, not that of the plaintiff, the test. We conclude from the opinion in this case that if a citizen of one State is allowed to sue and a non-citizen is not allowed, on a cause of action created by the law of the place of suit, the statute is unconstitutional. That, we think, is as far as this court has gone and even that was unnecessary to the particular decision. The opinion says:

> "But, subject to the restrictions of the Federal Constitution, the state may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them" (p. 148).

Our investigation does not disclose a holding by this court of a constitutional right in a non-resident to sue another non-resident upon a cause of action arising outside the state. This phase of the problem may be put in the language used by Mr. Paxton Blair in his article entitled "The Doctrine of Forum Non Conveniens in Anglo-American Law," Columbia Law Review, Vol. XXIX, page 18:

> "It would be uncandid to purport to find in the decisions of the United States Supreme Court which we have discussed anything but negative results. But even negative results may serve as a basis for generalizations; and the ultimate truth, when revealed, will probably not be inconsistent with these two propositions: (1) the constitutional right of a non-resident to sue has never been held by the Supreme Court to embrace a right to sue another non-resident upon a cause of action arising outside the state and governed not by the *lex fori* but by the *lex loci;* (2) the decisions or dicta recognizing in a non-resident *some* right to sue are confined in their scope to situations where there has been some nexus with the forum."

From the decisions of this court it would appear there was no constitutional right in this petitioner, a resident and citizen of Connecticut, to sue in New York the defendant, a Connecticut corporation, on a tort committed in Connecticut, the cause of action arising out of the Federal Employers' Liability Act, a part of the statutory law of Connecticut as much as of the statutory law of New York. The cause of action did not arise in New York out of business done by the defendant therein. The immaterial fact that the defendant was doing some business in New York can hardly serve as the basis for the invocation by petitioner of a constitutional privilege.

The discrimination is not directed against plaintiff be cause he is a non-resident. He may not sue if 1) he is non-resident, 2) defendant is a foreign corporation al though doing business in New York, 3) the action is in tort, 4) committed outside of New York, 5) New York is no more convenient than Connecticut, 6) no practical reason exist for suit in New York. Non-residents are capable o separate identification from residents by facts and cir cumstances other than that they are non-residents. Thi goes further than is required for permissive classificatio (please see language of opinion of Mr. Justice White, i *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, at p 98).

That residence is not the sole basis for classificatio appears from the treatment of contract cases which ar almost invariably entertained. Subdivisions 1, 2 and 3 o § 47 of the General Corporation Law show legitimate at tempts to discriminate on account of the character of th cause of action rather than of the plaintiff.

They look to the subject matter rather than to the ca pacity of the plaintiff to sue.

(2) *"Practical justifications."*

There was involved in *LaTourette* v. *McMaster*, *supr* an act of South Carolina providing for the licensing o insurance brokers. Only such persons as were resident of the State could be licensed. LaTourette was a reside and citizen of New York, and could not comply with thi requirement. It was pointed out that the character of th business of insurance was clothed with a public intere

and subject, therefore, to the regulating power of the State. This court agreed that one of the privileges of a citizen is to pursue any lawful business or vocation. This court said that it must accept the interpretation of the statute given by the Supreme Court of the State. The Supreme Court of the State declared there was no discrimination on account of citizenship, the discrimination resting alone on residence in the State. In conclusion this court said:

> "In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other States, residence and citizenship being different things" (p. 470).

This case is authority for the proposition that the discrimination under the New York Statute is not between citizens and non-citizens, but between residents and non-residents, which we have discussed under Point I (d). But the case is also authority for the proposition that discrimination may be made if we have "practical justifications."

No section of the Constitution defines the privileges and immunities of citizens. *Minor* v. *Happersett*, 21 Wall. 162, 170. As early as 1876 it was held in *Chemung Canal Bank* v. *Lowery, supra*, that a provision to the effect that when the defendant is out of the State, the statute of limitations shall not run against the plaintiff if the latter resides in the State, but shall if he resides out of the State, is not repugnant to the second section of the fourth article of the Constitution of the United States. The opinion says there was a valid reason for the discrimination, the statute was equitable and just. The court took into consideration a personal obligation due at the domicile of the obligee.

In *McCready* v. *Virginia*, 94 U. S. 391, Virginia prohibited the citizens of other States from planting oysters in Ware River. This was held not to be a privilege of a citizen of another State. The citizens of Virginia owned the property, not by virtue of citizenship merely, but by virtue of citizenship and domicile united, a citizenship confined to that particular locality, says the opinion. This court has not attempted to define the word "privileges." There is some intimation in the opinion that it relates to a right of general not of special citizenship.

The process of attachment may be allowed against a non-resident and not against a resident. A bond may be required as a prerequisite to the issue of an attachment against a resident and not be required in the case of a non-resident. *Central Loan & Trust Co.* v. *Campbell, supra.*

This court considered the system of taxation prevailing in Connecticut in *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364. It was held "that mere inequality in the results of a State tax is not sufficient to invalidate it." *Ballard* v. *Hunter*, 204 U. S. 241, held that a State may make reasonable discrimination in regard to service of process between residents and non-residents. In *Heim* v. *McCall*, 239 U. S. 175, it was held that New York could provide by statute for preference to citizens of that State on public works without a violation of the privilege clause of the Constitution. In another connection we have discussed *La-Tourette* v. *McMaster*. The legislation involved was passed in the exercise of a power of government, had relation to that power, and the opinion discusses the motive of the statute. We have also considered *Canadian Northern Ry. Co.* v. *Eggen*, and the test of reasonableness. *Ferry* v.

Spokane P. & S. Ry. Co., 258 U. S. 314, held that dower was not a privilege or immunity of citizenship. Here we have a declaration of further limitation of the word "privileges." The discrimination has a reasonable support in fact and is laid on other suitors in like situations. Please see *Kentucky Co.* v. *Paramount Exch.*, 262 U. S. 544, at p. 551. We have in the case at bar no hostile discrimination against non-residents. "Literal and precise equality in respect of this matter is not attainable; it is not required." *Hess* v. *Pawlowski*, 274 U. S. 352, at p. 356. And throughout all this we see procedural remedies often become substantial rights, making these cases most persuasive.

(3) *New York's judicial policy in the treatment of non-residents is reasonable.*

There are certain outstanding cases in New York to which we first wish to call attention.

In *Robinson* v. *Oceanic Steam Nav. Co., supra,* the plaintiff, as administrator, commenced an action in New York to recover damages against the defendant, a foreign corporation, for negligently causing the death of his intestate. The death occurred upon the ocean within the territorial limits of the United Kingdom of Great Britain and Ireland. Under the statute then in force an action could not be maintained by a non-resident plaintiff against a foreign corporation for a cause of action which arose outside of the state limits. The opinion says:

> "The discrimination between resident and non-resident plaintiffs is probably based upon reasons of public policy, that our courts should not be vexed

with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose, or the subject-matter of the litigation is situated within this state" (pp. 323, 324).

The Court of Appeals said in *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435 (1903), at page 441:

> "Is it possible, by a device so simple and transparent as the one here disclosed, to confer upon the Supreme Court of this state jurisdiction to try a negligence action having its origin in the state of Connecticut and between a corporation and residents of that state?
>
> "If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry and impose thereby upon our already overworked courts the obligation to try actions imported from a foreign jurisdiction."

Although the questions involved were different from those in the case at bar the opinion of the Court of Appeals in *Hunter* v. *Mutual Reserve L. Ins. Co.*, 184 N. Y. 136 (1906), at pages 144 and 145, is significant:

> "It would be quite beyond the spirit of those decisions to hold and we cannot believe that it was the further policy of such legislation to create and perpetuate a local forum to which under guise of an assignment to some resident, non-residents of far distant states might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out."

This paragraph is quoted in the opinion of this court in 218 U. S. 573, at page 588, affirming *Hunter* v. *Mutual Reserve L. Ins. Co., supra.*

In *Pietraroia* v. *N. J. & H. R. R. & F. Co., supra,* the Court of Appeals held that New York was not bound to exercise jurisdiction in an action on a foreign tort against a foreign corporation, although the plaintiff was a resident. The opinion says:

> "As a question of policy, it is intolerable that our courts should be impeded in their administration of justice, and that the people of the state should be burdened with expense, in redressing wrongs committed in another state, for the benefit, solely, of its citizens, and where the remedy is in the enforcement of its statutes" (p. 439).

The Court of Appeals in *Waisikoski* v. *P. & R. Coal & Iron Co.,* 228 N. Y. 581 (1920), affirmed the judgment of the Appellate Division on the opinion of Jenks, *P.J.,* in 173 App. Div. 538. Plaintiff resided in Pennsylvania, defendant was a Pennsylvania corporation, doing business in New York. The action was brought to recover damages for personal injuries sustained by plaintiff while employed by defendant in Pennsylvania. It was held that under Subdivision 4 of § 1780 of the Code of Civil Procedure the court had discretionary jurisdiction. The opinion in the Appellate Division says:

> "It seems but just that the Legislature should not confer the absolute right to institute a litigation of this character in our courts, beyond the discretion of the court to refuse to entertain it. Aside from the question of legislative power, I do not read the statute as thus absolute, but I think that the discre-

tion to entertain or to refuse such an action as discussed and declared in *Pietraroia's* case, *supra*, still exists. See, too, *Zeikus* v. *Florida East Coast Railway Co.*, 144 App. Div. 91, 128 N. Y. Supp. 933. The expression of the statute that such an action 'may be maintained' is not to be construed as mandatory upon the court. *Talmage* v. *Third Nat. Bank of City of N. Y.*, 91 N. Y. 531-537. See, too, *People ex rel. Comstock* v. *City of Syracuse*, 59 Hun, at page 260, 12 N. Y. Supp. 890, affirmed 128 N. Y. 632, 29 N. E. 146."

In *Gregonis* v. *P. & R. Coal & Iron Co.*, *supra*, the Court of Appeals said:

"On the other hand, by a long line of authorities the courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state, where both the plaintiff and the defendant were *non-residents*. (*Pietraroia* v. *New Jersey & Hudson R. Ry. & F. Co.*, 197 N. Y. 434; *Hoes* v. *N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435; *Hutchinson* v. *Ward*, 192 N. Y. 375; *Collard* v. *Beach*, 81 App. Div. 582; *Zeikus* v. *Florida East Coast R. R. Co.*, 144 App. Div. 91.) The reason for this exception is stated in the cases, and the rule has been too firmly imbedded in our jurisprudence to justify modification without legislative action. The courts also have been obliged to reject litigation even by residents where it was futile and useless to assume jurisdiction. This has been called lack of jurisdiction over the subject-matter. Thus, one state will not give effect to rights arising under the penal laws of another state (*Raisor* v. *C. & A. R. Co.*, 215 Ill. 47), nor enforce or regulate the internal workings of a foreign corporation (*Marshall* v. *Sherman*, 148 N. Y. 9; *Post & Co.* v. *Toledo, C. & St. L. R. R. Co.*, 144 Mass. 341, p. 345), nor entertain actions which relate directly to real property

situated in a foreign state. (*Alger* v. *Alger*, 31 Hun 471.) Neither will it enforce a foreign law which conflicts with its own settled policy or is adverse to principles of abstract justice. (*Loucks* v. *Standard Oil Co., supra.*) It may be also that the courts of this state will not feel inclined to take jurisdiction where a right is given by a foreign statute which provides an exclusive remedy to be enforced in a particular way or before a special tribunal. (*Coyne* v. *Southern Pacific Co.*, 155 Fed. Rep. 683; *Southern Pacific Company* v. *Dusablon*, 48 Tex. Civ. App. 203; *Hutchinson* v. *Ward*, 192 N. Y. 375.) The court here, however, has both jurisdiction of the parties and of the subject-matter" (pp. 160, 161).

The judgment in the case at bar was affirmed on the authority of *Murnan* v. *Wabash Railway Co., supra*, and the Court of Appeals in the latter case said:

"Although the rule prohibits a court of general jurisdiction from refusing to exercise its jurisdiction in its discretion, it has often been held that the courts of this State may refuse in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a sister State where both the plaintiff and defendant are non-residents. (*Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, 160, and cases cited.) While no controlling reason compelled, the Special Term refused to assume jurisdiction; it refused, it would seem, for reasons of convenience, to hear the case and vacated the service of the summons under the authorities referred to" (pp. 246, 247).

The case went back to the Appellate Division which decided to entertain jurisdiction in view of the circumstances.

"Our courts are not supported by the people for any such purpose." *Ferguson* v. *Neilson*, 33 N. Y. St. Repr. 814.

The witnesses would have to be brought into New York. *Zeikus* v. *Florida East Coast Railway Co.*, 144 App. Div. 91 (1911). To exercise discretionary jurisdiction has become a matter of public policy. *Payne* v. *New York, Susquehanna & W. R. R. Co.*, 157 App. Div. 302 (1913); *Colorado State Bank* v. *Gallagher*, 76 Hun 310 (1894). In *Collard* v. *Beach*, 81 App. Div. 582, 93 App. Div. 339, is this: " • • • the calendars of the courts of this State are congested • • • it would impose an undue burden upon the courts of our State if the practice were established of assuming jurisdiction in such cases" (pp. 340, 341). As parts of this problem we have the elements of expense, particularly expense of administration, congestion, taxation, maintenance of courts, delays of justice, availability of witnesses, convenience of forum.

Now § 47 of the General Corporation Law makes no distinction between causes of action based upon tort and those based upon contract but in contract cases the jurisdiction is usually entertained and in tort cases occasionally entertained depending upon the facts.

The following are tort cases entertained: *Murnan* v. *Wabash Railway Co., supra; Richter* v. *Chicago, R. I. & Pac. Ry.*, 123 Misc. 234 (1924); *Perinet* v. *Central Vt. Ry.*, 215 App. Div. 711 (1926). In contract cases the jurisdiction is usually entertained. *Smith* v. *Crocker*, 14 App. Div. 245 (1st Dept. 1897), *aff'd* without opinion, 162 N. Y. 600 (1900); *Furbush* v. *Nye*, 17 App. Div. 325 (1st Dept. 1897); *Belden* v. *Wilkinson*, 44 App. Div. 420 (1st Dept. 1899); *Wertheim* v. *Clergue*, 53 App. Div. 122 (1st Dept. 1900); *Stagg* v. *British Controlled Oilfields, Ltd.*, 117 Misc. 474 (1921); *Davis* v. *Kessler & Co.*, 118 Misc. 292 (1922);

Rodger v. *Bliss*, 130 Misc. 168 (1927); *Crane, Hayes & Co.* v. *N. Y., N. H. & H. R. R. Co.*, 131 Misc. 71 (1927); *Phillips & Sons* v. *Central of Ga. Ry.*, 243 N. Y. 650 (1926). Only in tort cases, arising outside of New York, between non-residents, do New York courts make it a rule to exercise a reasonable discretion, based upon all the circumstances. Mere non-residence is never controlling. Because of non-residence other circumstances may come in making reasonable the refusal of jurisdiction.

In connection with all this, as we pointed out on page 19 of our original brief, the record shows no fact objection to trial in Connecticut other than the allegation of powerful influence of respondent in Connecticut and that verdicts in that State are small and inadequate in cases for personal injury against this respondent (R., 13, 16). We have the broad ground of no necessity for both parties to litigate away from home, plaintiff can obtain jurisdiction over defendant in Connecticut where both parties reside, where the accident happened, where the defendant is incorporated, and where the witnesss are available. New York has not, on the one hand, committed an act of hostility, and has not, on the other hand, decided the case as a mere matter of convenience.

The physical position of New York City and counties adjoining makes the situation peculiarly pressing. Of the 9,444 cases filed in the Supreme Court, New York County, from March to December, 1927, 6,915, or over 73%, were for death, personal injury and loss of services growing out of accidents (See Message to the Legislature from Governor Alfred E. Smith relative to the congestion of the court calendars owing to the increasing number of motor vehicle

accidents, dated January 9th, 1928, Legislative Document No. 53, 1928).

(*f*) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable, and, therefore, not a violation of § 2 of Article IV of the Constitution.

"Distinctions of degree must be made." *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616; *Anglo-Am. Prov. Co.* v. *Davis Prov. Co. No. 1, supra.* As applied to the respondent "we think the conditions are unreasonable and burdensome, and therefore in conflict with the commerce clause." *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205. A foreign corporation which engages in interstate commerce is not immune from service of process in an action arising out of business transacted within the State, *International Harvester* v. *Kentucky*, 234 U. S. 579, but total exemption from suit is one thing, and unnecessary state regulation of interstate commerce is another thing.

In addition to the grounds already set forth applying to actions brought by non-residents against non-residents on account of foreign torts, because the defendant is a railroad common carrier engaged in interstate commerce we have present additional reasons why the refusal to exercise jurisdiction should be approved. In *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, the state statute was held to impose an unreasonable burden on interstate commerce and was void under the Commerce Clause. We do not need to go so far in the case at bar, but can approach the problem from the point of view of reasonableness.

During the period of federal control the Director General by Orders No. 18 and 18A required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. The facts of our case would not satisfy the requirements of those orders, and Mr. Justice Brandeis in *Davis* v. *Farmers Co-operative Co., supra,* said:

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war" (p. 316).

It was recognized in the opinion that claims for personal injuries and for loss and damage of freight are numerous; that this kind of litigation entails absence of employees from their customary occupation, which in time impairs efficiency in operation and causes heavy expense; that the public are interested in maintaining adequate, uninterrupted transportation service at reasonable cost; that the public is interested in the avoidance of waste, in interstate transportation; and that by requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce.

(1) *Cases Holding Suit to be Burden on Interstate Commerce:*

In *Davis* v. *Farmers Co-operative Co., supra,* plaintiff and defendant were foreign corporations not operating within the State, and the cause of action arose outside. In *Michigan Central Railroad Co.* v. *Mix et al.* (U. S. Supreme Court, decided February 18, 1929), plaintiff became a resident of Missouri after the injury, but before suit, and plaintiff's intestate, an employee of defendant, resided in

Michigan when killed there. Defendant was a foreign corporation not operating within Missouri, and the cause of action arose outside. This Court said:

> "The mere fact that she had acquired a residence within Missouri before commencing the action does not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time."

In *Atchison Ry. Co.* v. *Wells*, 265 U. S. 101, plaintiff was a non-resident, defendant a foreign corporation not operating within the State, and the cause of action arose outside. In *Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977, the plaintiff was a non-resident, defendant a foreign corporation operating within the State, cause of action arose outside. The action was brought under the Federal Employers' Liability Act and is analogous to the case at bar.

Davis v. *Farmers Co-operative Co., supra*, did not decide the case where plaintiff was a resident, defendant a foreign corporation not operating within the State, and the cause of action arose outside, but the service was held invalid in *Thurman* v. *Chicago, etc., Ry.*, 254 Mass. 569. Also, *Davis* v. *Farmers Co-operative Co., supra*, expressly did not decide the case where plaintiff was a foreign corporation, defendant a foreign corporation not operating within the State, the cause of action arising outside but the transaction out of which it arose within the State.

We have noted that *Leon* v. *Central of Ga. R. R.*, 213 App. Div. 853 (1925), followed *Davis* v. *Farmers Co-oper-*

ative Co., supra, and *Cancelmo* v. *Seaboard Air Line Ry. Co.,* 12 Fed. (2d) 166, 169 (1926), refers to it but does not pass upon the question.

(2) *Cases Holding Suit not to be Burden on Interstate Commerce:*

In *St. Louis B. & M. Ry.* v. *Taylor,* 266 U. S. 200, plaintiff was a foreign corporation, but doing business within the State, defendant a foreign corporation and not operating within, the goods were deliverable within the State, and the negligent act was possibly within. In *International Harvester* v. *Kentucky, supra,* plaintiff was a resident, the defendant a foreign corporation operating within the State, and the cause of action arose within. In *Hoffman* v. *Foraker,* 274 U. S. 21, the plaintiff was a non-resident, the defendant a domestic corporation operating within the State, and the cause of action arose outside. In *Griffin* v. *Seaboard Air Line Ry. Co.,* 28 Fed. (2d) 998, the plaintiff was a resident, the defendant a foreign corporation and not operating within the State, and the cause of action arose outside. In *Schendel* v. *M'Gee,* 300 Fed. 273, plaintiff was a non-resident, who started suit in the United States District Court for the District of Minnesota. The defendant was a foreign corporation operating within Minnesota, and the cause of action arose outside. It was, of course, held that the Federal Employers' Liability Act gave a right to bring the action in the United States District Court. In *Maverick Mills* v. *Davis,* 294 Fed. 404, the plaintiff was a resident, the defendant a foreign corporation doing business within the State, and the cause of action arose outside.

In New York we find *Hewitt* v. *Canadian Pac. Ry.,* 124

Misc. Rep. 186, affirmed in 212 App. Div. 815 (1924), where the plaintiff was a resident, the defendant a foreign corporation doing business within, and the cause of action arose partly within the State. The motion to vacate was denied on the authority of *St. Louis, B. & M. Ry.* v. *Taylor, supra.* This last case was also cited in *Johnston* v. *Atlantic Coast Line R. Co.*, 128 Misc. Rep. 82 (1926).

In the case at bar petitioner was a non-resident, respondent a foreign corporation operating within the State, and the cause of action arose outside. These are the facts in *Weinard* v. *Chicago, M. & St. P. Ry. Co., supra,* where the action was held to be a burden upon interstate commerce, and also the facts of *Schendel* v. *M'Gee, supra,* but there the action was brought in the United States District Court as expressly provided by Congress, and the opinion recognizes the burden. We do not understand why the reasoning of *Davis* v. *Farmers Co-operative Co., supra,* does not apply with full force.

(g) Section 2 of Article IV of the Constitution of the United States does not grant either to residents or citizens of Connecticut, as such, the absolute right to maintain transitory actions in the courts of New York against other residents or citizens of Connecticut for a cause of action arising in Connecticut.

This is amply demonstrated by the fact that it has long been customary for courts of equity at the domicile of the parties where the cause of action accrues to enjoin the prosecution of the suit in the courts of a sister State upon facts warranting equitable relief. *Cole* v. *Cunningham*, 133 U. S. 107.

Such an injunction has been granted upon a set of facts similar to the case at bar and arising under the Federal Employers' Liability Act. *Reed's Administrator* v. *Illinois Central R. Co.*, 182 Ky. 445.

Since petitioner could have been enjoined in Connecticut from prosecuting his action in New York it is submitted that the dismissal of the summons and complaint in New York violated no constitutional right of petitioner and that the dismissal was reasonable.

(h) The action of the New York courts pursuant to the statute in question amounted merely to a regulation of venue.

It has long been customary for several States to require that a non-resident must sue a resident in the county in which the resident resides but to permit the non-resident to be sued by the resident in any county where personal service may be had. Thus, in so far as venue is concerned, the non-resident may be subjected to different requirements and it has never been held that such differences in treatment violate Section 2 of Article IV of the United States Constitution.

Petitioner could have brought his action in the Federal Court for the Southern District of New York as a matter of right. Act of Congress of April 22, 1908, Ch. 149, Sec. 6, as amended by the Act of April 5, 1910, Ch. 143, Sec. 1, being 35 Stat. 66 and 36 Stat. 291. The action of the Supreme Court of New York in dismissing the summons and complaint relegates non-residents to the federal courts of New York but allows residents to bring suit

either in the federal courts of New York or the state courts of New York. In requiring the non-resident to lay his venue only in the federal courts of New York the state court did not act unreasonably because the state courts are supported by the residents of the State whereas the federal courts are supported by the federal government which draws its revenue from the forty-eight States. Please see *Canadian Northern Railway Co.* v. *Eggen, supra,* and *Blake* v. *McClung, supra.*

For general treatment of this subject matter of Point I please see Yale Law Journal, Vol. XXXVII, May, 1928, pp. 983-987; Harvard Law Review, Vol. XLI, Jan., 1928, pp. 387-390; Columbia Law Review, Vol. XXIX, Jan., 1929, pp. 1-34. This court has adopted a liberal policy of interpretation of the equal privileges clause. It considers the facts of each case to determine the possible existence of hostility. It applies the doctrine of presumption of constitutionality of a statute. It looks to see whether the plaintiff has been unduly prejudiced. It refuses to define or limit in general. The purpose of the section derived from Art. IV of the Articles of Confederation is "The better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." We respectfully submit that this purpose does not require this court to sustain petitioner's claim.

POINT II

The Courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

The opinion in the latter case recites that there has been no attempt by Congress to enlarge or regulate jurisdiction of state courts; that notwithstanding the Federal Employers' Liability Act the States may still proceed in conformity with their general principles of practice; that the New York courts exercise their discretion in similar cases; and that to hold otherwise would be an unreasonable conclusion and a resulting invasion of state tribunals.

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

In the first place, this is indicated by the wording of the statute itself. The Act of Congress of April 22nd, 1908, c. 149, § 6, as amended by the Act of April 5th, 1910, c.

143, § 1, being 35 Stat. 66 and 36 Stat. 291, reads in part as follows:

> "Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases*, 253 U. S. 350, 387. Furthermore, neither the statute nor the Amendment is "the source of the power of the states." *United States* v. *Lanza*, 260 U. S. 377, 381; *Hebert* v. *Louisiana*, 272 U. S. 312, 315.

In the third place, in the Act quoted we find the words "competent jurisdiction," referring to the state courts. Now the Judicial Code, § 28, Act March 3rd, 1911, c. 231, § 28, 36 Stat. 1094, as amended, Act January 20th, 1914, c. 11, 38 Stat. 278, reads in part as follows:

> "Provided, That no case arising under an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and

> brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Here again are the words "competent jurisdiction." Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary.

The decisions of this and of other courts bear out this statutory interpretation. In *Chambers* v. *Baltimore & Ohio R. R., supra,* it was held "subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its Courts, and the character of the controversies which shall be heard in them" (p. 148). While this case was decided in 1907 and consequently could not refer to the effect of the Act under consideration, it enunciated a general principle of long standing.

The cause of action in *Second Employers' Liability Cases,* 223 U. S. 1, was based on the 1908 Act. The Supreme Court of Errors of Connecticut had erroneously expressed the opinion that the federal courts had exclusive jurisdiction. This court said that the enforcement of the Act was not restricted to the federal courts; that the Act did not grant jurisdiction to the state courts, did not enlarge or regulate jurisdiction. The courts in Connecticut were accustomed to exercise jurisdiction of personal injury and death cases arising in another State (pp. 348, 349).

The opinion reads in part as follows:

> "We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to

the occasion. The first of the cases now before us was begun in one of the Superior Courts of the State of Connecticut, and, in that case, the Supreme Court of Errors of the State answered the question in the negative. That, however, was not because the ordinary jurisdiction of the Superior Courts, as defined by the constitution and laws of the State, was deemed inadequate or not adapted to the adjudication of such a case, but because the Supreme Court of Errors was of opinion (1) that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts, and (2) that, if this be not so, the Superior Courts are not at liberty to decline cognizance of actions to enforce rights arising under that act, because (a) the policy manifested by it is not in accord with the policy of the State respecting the liability of employers to employes for injuries received by the latter while in the service of the former, and (b) it would be inconvenient and confusing for the same court, in dealing with cases of the same general class, to apply in some the standards of right established by the congressional act and in others the different standards recognized by the laws of the State.

"• • • The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it.

"Because of some general observation in the opinion of the Supreme Court of Errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take

> cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure. We say 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion,' because we are advised by the decisions of the Supreme Court of Errors that the Superior Courts of the State are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in cases where the right of action arose under the laws of that State, but also in cases where it arose in another State, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery as where the causal negligence was that of a fellow-servant" (pp. 55-57).

In *Walton* v. *Pryor, et al.*, 276 Ill. 563, 245 U. S. 675, suit was brought under the Federal Employers' Liability Act, the death occurring in Missouri. The Illinois law provided that no action should be brought to recover damages for death occurring outside of Illinois. That State refused to entertain the suit, the court saying:

> "The Supreme Court of the United States has said that there has been no attempt of Congress to enlarge the jurisdiction of the State courts but only to require its exercise consistently with local laws, and the enforcement of liability for damages occasioned by a death outside of the State is not consistent with such laws" (pp. 570, 571).

In *Loftus* v. *Pennsylvania R. Co., supra,* an action under the Federal Employers' Liability Act was denied a hearing because the law of the State excluded from the jurisdiction of its courts all causes against railroads for

injuries suffered outside the State, unless claimant was a resident.

Loftus, a resident and citizen of Pennsylvania, an employee of the Pennsylvania Railroad Company, a corporation organized under the laws of Pennsylvania, brought suit under the Federal Employers' Liability Act to recover damages for injuries received in Pennsylvania. The suit was brought in Ohio, where the defendant operated. Defendant moved to quash the service of the summons. It was held that the federal lawmaking power could not confer compulsory jurisdiction upon the trial courts of Ohio; that the federal statute created the right but the States provided the remedy of establishing courts and declaring their jurisdiction.

(b) Congress cannot enlarge state jurisdiction.

Was it not held by Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, that Congress could not confer any of the judicial power of the United States upon the state courts? The situation was clearly explained by Mr. Justice Washington in *Houston* v. *Moore*, 5 Wheat. 1,—that Congress cannot confer any of the judicial power of the United States upon the state courts, but the latter may exercise jurisdiction even over causes arising out of the acts of Congress, if they have the authority in their own inherent powers and if Congress has not made the jurisdiction of the federal courts exclusive.

In *Rushworth* v. *Judge of Hudson Common Pleas*, 58 N. J. L. 97, the relator was refused naturalization in New Jersey solely upon the ground his application was not made in accordance with the New Jersey statute. The fed-

eral statute involved had expressly selected the state courts as one of the federal agencies to hear and act upon application for naturalization.

Held:

> "• • • Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction" (p. 100).
>
> "The state establishes its own courts, defines their jurisdiction, appoints its judges and pays their salaries" (p. 101).

The opinion in *Murnan* v. *Wabash Railway Co., supra,* on the authority of which this case was decided by the Court of Appeals, reads on page 248 as follows:

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State. The practice may be anomalous but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary, seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Petitioner's claim amounts to this—because he sues under a federal statute he is entitled, *ipso facto,* to

sue in a state court although otherwise he would not be so entitled. There is no dispute that the Act in question is part of the supreme law of the land. *Claflin* v. *Houseman*, 93 U. S. 130, 137. But the Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *Baltimore & Ohio R. Co.*, 283 Fed. 655, at page 656. Each State decides for itself the jurisdictional limitations of its courts.

State jurisdiction must extend to the very case. *Walton* v. *Pryor, supra; Rushworth* v. *Judges of Hudson Common Pleas, supra; Anglo-American Provision Co.* v. *Davis Provision Co., supra.*

Furthermore, a State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra*, denied jurisdiction to an action brought under the Federal Employers' Liability Act because of a provision of a state statute. This Court said in *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, that even the constitutional clause of full faith and credit did not impose jurisdiction upon a state court in a suit upon a judgment where the state court rendering the judgment did not have jurisdiction of the original cause of action.

In general Congress cannot impose jurisdiction upon state courts, can leave jurisdiction to state courts over causes arising out of acts of Congress, can make jurisdiction of federal courts exclusive over causes of action arising out of acts of Congress. New York, having con-

current jurisdiction, "is free to adopt such remedies, and to attach to them such incidents, as it sees fit." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. See also *Engel* v. *Davenport*, 271 U. S. 33, 37, 38; *St. Louis & Iron Mt. Ry.* v. *Taylor*, 210 U. S. 281, 285, 38 Harvard Law Review, 545, 546.

Petitioner's brief shows a confusion of thought in respect of the general jurisdiction of the New York Supreme Court. *Robinson* v. *Oceanic Steam Nav. Co., supra*, makes clear the legislative control of action by non-residents against foreign corporations. See also N. Y. State Constitution, Art. I, § 16.

CONCLUSION

We respectfully submit that the judgment should be affirmed.

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